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Federal Communications Commission
Office of the Secretary

INTERGOVERNMENTAL ADVISORY COMMITTEE

TO THE

FEDERAL COMMUNICATIONS COMMISSION

ADVISORY RECOMMENDATION NUMBER 2012 – 01

Notice of Inquiry, WC Docket No. 11-59

In the Matter of

Acceleration of Broadband Deployment:

Expanding the Reach and Reducing the Cost of Broadband Deployment
by Improving Policies Regarding Public Rights of Way and Wireless Facilities Siting

I. INTRODUCTION

The Intergovernmental Advisory Committee (IAC) to the Federal Communications Commission (Commission) submits this Recommendation to address important issues raised by the Commission in its Notice of Inquiry, WC Docket No. 11-59 (NOI) regarding Acceleration of Broadband Development. The IAC strongly believes that most local, state and tribal governments understand quite well the importance of broadband deployment, availability and affordability to the future of their communities. In most cases, local, state and tribal governments make informed, timely and reasonable decisions regarding broadband issues, balancing broadband goals when necessary with the many other responsibilities and duties that local, state and tribal governments owe to their citizens. The Commission should strive to better understand how these jurisdictions balance their many obligations, including broadband, and work together with local, state and tribal governments to promote broadband in a collaborative manner.

The NOI seeks a wide range of information from interested parties about broadband deployment and related issues. A number of individual IAC members are themselves representatives or members of jurisdictions or other entities that have filed Comments and Reply Comments in this docket, and it is not the intent of the IAC to rehash those Comments and Reply Comments here. Rather, it is our goal to identify just how important broadband deployment, availability and affordability is to our constituents, to job growth, to community building and to our ability to compete successfully in a global economy – while at the same time recognizing that broadband is just one of the critically important activities our jurisdictions must tackle; activities which at times may be in conflict with other goals, and which call for actions that are thoughtful, considerate and balanced. We urge the Commission to work with us to better understand the local, state and tribal role in promoting broadband within our communities, and to support us in our efforts to make these goals attainable.

II. SELECTED KEY RIGHTS-OF-WAY ISSUES FOR LOCAL, STATE AND TRIBAL AUTHORITIES

What follows is a description a number of issues that demonstrate how rights-of-way management affects our communities.

1. Cable to IP Transition. Billions of dollars of annual state, county, local and tribal franchising revenue, as well as the state and local role in assuring PEG channels and programming, universal access and consumer protection in video programming, are currently dependent on a 30 or more year old model of cable franchising that is inconsistent with the impending (or already occurring) shift to IP-delivery of video. We as custodians of state, local and tribal rights-of-way need to begin working immediately with the FCC and if necessary with Congress to assure that technical changes in the method of video delivery do not have the unintended result of destroying decades of federal, state and local efforts to ensure that state and local taxpayers and consumers are properly compensated (in the form of both public services and funding) for private, profit-making occupancy of public rights-of-way. For example, the FCC needs to reexamine its implementation of the franchise cap in 47 USC 542(b) so that the Congressional intent of assuring meaningful compensation to state and local franchise authorities is maintained in an IP video-based world, as does the application of provisions such as 47 USC Section 552(a)(1) and (2) (relating to customer service and universal coverage), and concepts such as the basic tier presence of public, educational and government programming and resources for critical public institutional networks. We have an obligation to the public to manage public property in responsible way. Commission regulations should be technology neutral, and recognizing that some issues relating to compensation are governed by Tribal, state and local law, the Commission should take no action to limit Tribal, state and local authority.

2. Antennas on Public Property. Historically, when cellular or CMRS companies have sought to install antennas on public properties (such as municipal or county office buildings, schools, police or fire stations, government-owned open land, etc.), governments owning these buildings have enjoyed broad authority, similar to that of private landlords, to decide whether they want to allow such antennas, and if so on what rental and other terms and conditions¹. Presumably, state, county and local governments should have at least as much authority when antenna builders propose to install such antennas on government-owned structures that sit in public streets (such as street light and traffic signal poles). However, some private companies have sought to have the FCC and/or the courts impose new limits on such local authority with respect to such installations. There are often very good policy reasons for state, county, local and tribal governments to encourage placement of wireless antennas on public-owned property. But the policy tradeoffs to be made with respect to public properties must remain within the control of the state, county, local and tribal governments who own or manage such properties.

3. Public Space Amenity Facilities. Issues related to the installation of facilities on public property for the provision of IT and communications services to specifically public spaces need to be clarified in a manner that will assure that public property managers can protect all aspects of the public interest. For example, some cities are now seeing cable companies expand into provision of wi-fi services of a proprietary nature (i.e., service available only to cable

¹ Such broad authority arising from land ownership is distinct from land use management related authority over siting of antennas on private property, which is subject to certain limits under 47 USC 332(c)(7)(B).

subscribers) to public spaces. In some cases cable companies may be installing or proposing to use antennas on public property for this purpose that are likely not "cable system" facilities authorized by existing cable TV franchises (because such antennas are not used for the provision of "cable services"). Local governments are also experimenting with a variety of approaches to authorizing and encouraging the provision of wi-fi or other information or communications services (which in some cases may be as low-tech as ordinary public space payphones). In order to assure effective use and management of public facilities in public spaces, state, local and tribal property managers need both clear and full legal discretion and a database of sharable best practices with respect to facilities to be located on public property if public spaces are going to be best served with communications and IT services.

III. LOCAL GOVERNMENTS HAVE BEEN ACTIVELY AND AGGRESSIVELY PROMOTING BROADBAND

This NOI has a specific focus on rights-of-way (ROW) and broadband facilities siting issues on other government property as well. Governments from urban, suburban and rural areas have been active in offering to make available public assets and resources to the private sector to facilitate broadband investment. Examples include:

1. The City of Seattle, Washington. Seattle has conducted nearly a decade of conversations and negotiations with the private sector, including releasing a request for information (RFI) to solicit interest in utilizing public assets, including ROW for broadband deployment. Most recently the city contracted with Comcast to make available city conduit in Pioneer Square so that Comcast could build fiber connectivity to the area.²
2. Garrett County, Maryland. Garrett County is currently in conversations with multiple incumbent and competitive carriers to determine what kinds of facilitation and financial support the County can provide those carriers to attract investment in broadband to reach unserved and underserved areas.³
3. Prince George's County, Maryland. Prince George's County released an RFI in 2009 soliciting private sector partners that would be willing to invest in broadband facilities in rural parts of the County, in return for County support and facilitation. The only respondent was Hughes Network Systems (satellite broadband provider).⁴
4. The City of Portland, Oregon. Over the past year, Portland has undertaken a broadband strategic planning program in consultation with private sector carriers to determine ways in which the City can facilitate carrier build-out. In 2009, Portland negotiated with a local

² For more information, contact Tony Perez, director of the City's Office of Cable Communications, tony.perez@seattle.gov.

³ For more information, contact Frank Shap, assistant director of the County's Office of Economic Development, fshap@garrettcountry.org.

⁴ For more information, contact Lakisha Pingshaw, network administrator in the County's Office of Information Technology, lpingshaw@co.pg.md.us.

facilities-based provider to help fund a fiber to the home pilot in low-income neighborhoods, but the provider decided not to proceed.⁵

5. New York, New York. New York City has been successfully franchising the use of its street poles for so-called "DAS" antennas since 2004, enabling expanded wireless coverage in New York while also protecting the esthetics of the City streetscape and the existing uses of the poles, assuring highest and best use of the limited available locations and generating new franchise rental revenue for the public that actually owns the relevant property. The IAC and the FCC should offer a clearinghouse of best practices, such as New York City's, with respect to DAS, while making it clear that individual communities cannot and must not be precluded from making their own unfettered decisions about how to balance the various issues regarding whether and on what terms to allow DAS and other antenna facilities to be installed on publicly-owned properties.⁶

6. Colorado Broadband Communities ("CBC"), the Cities of Arvada, Boulder, Golden, Lakewood, Louisville, Northglenn, Thornton, Superior, Wheat Ridge and the City and County of Broomfield, Colorado. In 2005, these ten municipalities on the west and north sides of Denver joined together to seek a private sector partner to deploy a state of the art, carrier grade wireless network that would cover each of these communities. Representatives from each jurisdiction met to review each of the cities' code provisions on wireless siting and rights-of-way access. Together, they agreed on a process to create a "one stop shop" operation whereby the network owner could, through one simplified application, obtain a permit to site facilities in any of the ten cities. After a competitive bidding process, the CBC chose a partner to contract with, but just prior to contract completion its partner dropped out due to an inability to obtain the necessary financing. Despite that setback, these ten communities have continued to meet and coordinate efforts to share resources and promote improved broadband deployment in metro Denver.⁷

IV. TRIBAL ISSUES

Telecommunication providers seeking ROW and leases for telecommunications infrastructure on tribal lands run a gamut of both tribal and federal reviews and approvals, and such approvals are generally subject to the National Environmental Policy Act (NEPA). These review and approval processes can take from several months up to years to accomplish. In approximately 2000, the Navajo Nation sought and gained Congressional approval for changes to 25 U.S.C. § 415 which gave the Navajo tribe the ability to issue its own surface leases (non-mineral) once it adopted tribal regulations approved by the Secretary. *See* 25 U.S.C. § 415(e). Since 2005, the Navajo Nation has had such regulations in place, approved by the Secretary of the Interior, for business site leases, and is currently seeking approval of its General Leasing Regulations. The General Leasing Regulations will give the Nation the ability to approve leases and permits for telecommunications towers, without further federal approval. However, for ROW for telecommunications fiber, federal approvals continue to be required for all tribes,

⁵ For more information, contact Mary Beth Henry, deputy director of the City's Department of Cable Communications, mbhenry@ci.portland.or.us.

⁶ For more information, contact bregal@law.nyc.gov.

⁷ For more information, contact Ken Fellman, General Counsel for Colorado Broadband Communities, kfellman@kandf.com.

including Navajo, as those are authorized under a separate statute. *See* 25 U.S.C. §§ 311-328. To ease regulatory burdens on the placement of telecommunications infrastructure on tribal lands and to facilitate broadband buildout, the Commission should encourage Congress to give other tribes similar authority for surface leases that Congress has given the Navajo Nation, and to encourage Congress to similarly amend the ROW statutes to allow for tribal approvals of ROW for fiber infrastructure.

V. RECOMMENDATION

1. State, Local and Tribal Authorities Understand the Importance of Broadband. The IAC urges the Commission to take note of and understand the importance that state, local and tribal officials place on broadband deployment in our communities. The Commission must respect the fact that while we recognize the importance of broadband to the future of our communities, it is but one of multiple responsibilities and obligations we face, and our task is to balance the promotion of broadband deployment and adoption with these other responsibilities. We recognize that while the private sector also believes in the importance of broadband deployment and adoption, it too has other goals, such as maximizing shareholder profit, which may at times conflict with the goal to deploy high speed, affordable broadband to all parts of our nation.

In the past, the Commission has been willing to adopt rules preempting traditional areas of local authority, in response to industry requests to minimize industry costs and incent the deployment of bigger, faster and more competitive networks.⁸ One never really knows if these efforts truly will lead to more deployment and competition, or whether they simply create a larger profit margin for providers. It is safe to say that the shot clock rules created to preempt local control and incent competitive cable systems have not resulted in any significantly new competition. The record in this NOI suggests that the shot clock rules adopted for wireless facility applications likewise have had no measurable positive impact on deployment but have had a negative impact on issues of importance to local communities.

2. The Commission Should Continue its Collaborative Educational Efforts. The IAC commends the Commission for its initial responses to the NOI. Recognizing that federal, state, local and tribal partners can be more effective when we work together, the Commission's efforts to provide educational information through its February 1, 2012 workshop on DAS and small cell technology was very successful. The IAC looks forward to working with the Commission on the upcoming workshop on co-location and on future educational and advocacy opportunities as well. We appreciate the Chairman's and the Commissioners' engaging in dialogue not just with the IAC, but with the multiple national organizations that represent our colleagues throughout the nation. The IAC hopes that it can successfully facilitate ongoing dialogue between the Commission and its state, local and tribal government partners to

⁸ *In re Implementation of Section 621(a)(1) of the Cable Communications Policy Act of 1984 as amended by the Cable Television Consumer Protection and Competition Act of 1992, First Report and Order and Further Notice of Proposed Rulemaking* 22 FCC Rcd. 5101 (2007); *In the Matter of Petition for Declaratory Ruling to Clarify Provisions of Section 332(c)(7)(B) to Ensure Timely Siting Review and to Preempt Under Section 253 State and Local Ordinances that Classify All Wireless Siting Proposals as Requiring a Variance*, WT Docket No. 08-165, FCC 09-99 (2009).

communicate about issues of concern and better understand the goals and the challenges that we each face. It is through mutual respect, collaboration, and cooperation, rather than preemptory rulemaking that we will best be able to work together to meet our broadband goals, improve our communities and our nation, and ensure that the United States will be a leader in the global economy for many years to come.

3. The Commission Should Work With the IAC and Industry to Develop a Voluntary Mediation Process to Address Individual Disputes. In response to one of the Commission's inquiries, the IAC supports the idea of a voluntary mediation process for industry and governmental entities to address individual disputes.⁹ Such a process could be similar to the voluntary mediation program that the predecessor to the IAC, the Local and State Government Advisory Committee, developed with the CTIA and the Commission. The IAC is willing to work with Commission staff and industry representatives to develop this process. We envision a process where the affected parties can approach the Commission or the Commission could independently suggest to parties, that an informal mediation be commenced. This mediation option could also be utilized to address differences on broadband deployment issues that exist between Tribal governments and federal agencies.

Approved on this 15th day of March, 2012.

INTERGOVERNMENTAL ADVISORY COMMITTEE



Joyce Dickerson, Chair

⁹See, NOI at para. 10.